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Nos. 848-850

IN THE

Supreme Court of the United States

OCTOBER TERM 1947

LEE YOUNG, LEE DEER, RALPH L. POLK, *Petitioners and Appellants below*

vs.

UNITED STATES OF AMERICA, *Appellee below*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF.

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To the Honorable FRED M. VINSON, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States.

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To the Honorable FRED M. VINSON, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States.

Your petitioners respectfully show:

SUMMARY STATEMENT OF MATTER INVOLVED

In a jury trial in the United States District Court, for the District of Kansas, petitioners were convicted of the following offenses:

LEE YOUNG: conspiracy to carry on the business of wholesale liquor dealer in violation of Section 88, Title 18, U.S.C., as charged in Count I of the indictment. (T-2); and failure to keep records in the form prescribed by the Commissioner of Internal Revenue, in violation of Section 2857, Title 26, U.S.C. as charged in the fourth Count of the indictment. (T-3)

LEE DEER: conspiracy to carry on the business of a wholesale liquor dealer in violation of Section 88, Title 18, U.S.C., as charged in Count I of the indictment (T-2); failure to pay tax to the Collector of Internal Revenue in violation of Section 3253, Title 26, U.S.C., as charged in the second Count of the indictment (T-9) and failure to post a sign reading "Wholesale Liquor Dealer" in violation of Section 2831, Title 26, U.S.C. as charged in the fifth Count of the indictment. (T-10)

RALPH L. POLK: failure to pay tax to the Collector of Internal Revenue in violation of Section 3253, Title 26, U. S. C. as charged in the second Count of the indictment (T-9) and failure to post a sign reading "Wholesale Liquor Dealer" in violation of Section 2831, Title 26, U.S.C. as charged in the fifth Count of the indictment (T-10).

Each petitioner duly filed his motion for a new trial which included, among other grounds, that the verdict of the jury was decided by means other than by a fair expression of opinion on the part of all jurors. (T-21).

After the Court overruled petitioners' motions for a new trial, he sentenced the defendants as follows:

LEE YOUNG: was adjudged guilty as charged and convicted and was committed to the Attorney General for two years on Count I of the indictment and ordered to pay a fine of $5,000.00 on Count IV. (T-29).

LEE DEER: was adjudged guilty as charged and convicted and was ordered committed to the Attorney General for imprisonment for two years on Count I, of the indictment, two years on Count II of the indictment, and to pay a $5,000.00 fine; the period of imprisonment on Count II to run concurrently with the imprisonment on Count I, and to pay a $500.00 fine on Count V. (T-26)

RALPH L. POLK: was adjudged guilty as charged and convicted and was ordered committed to the custody of the Attorney General for a period of two years and to pay a fine of $5,000.00 on Count II and to pay a fine of $500.00 on Count V. (T-28).

Thereafter, notice of appeal was filed in the Circuit Court of Appeals for the Tenth Circuit. (T-34).

Approximately twenty-eight (28) days after the jury rendered its verdict into Court, and some seventeen (17) days after the appeal had been perfected to the Circuit Court of Appeals, petitioners first learned that the jury had rendered a mistaken verdict. The trial Court was advised of the mistaken verdict the day after the verdict was returned, but no information concerning the mistake was furnished by the Court or the Court attaches to either of the defendants or their counsel. Affidavits were obtained from each of the twelve jurors, as set forth in the transcript of record, Supreme Court of the United States, October term 1947, number 252, Lee Young, et al, petitioners, vs. United States of America,

on petition for writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit, at pages 16 to 52 inclusive of said transcript, which affidavits should be examined and considered a part hereof, as if specifically set out herein. It will be noted that the affidavits indicate there were five counts in the indictment and six defendants on trial, that the jury had to agree upon thirty verdicts, that the jurors became weary and there was confusion as to the charges set forth in the respective counts of the indictment. In this connection, the Court had instructed in writing, but his instructions were not in chronological order with the counts in the indictment and the Court omitted sending the indictment into the jury room. The several jurors, each for himself, stated that the verdict as rendered into Court was a mistaken verdict in that, for example, the jury intended to find Ralph Polk guilty of entering into the conspiracy but not guilty of selling whiskey without a license, and to find the defendant Young guilty of selling whiskey without a license but not guilty of conspiracy, and it follows that the same mistake was made as to the defendant Lee Deer.

Upon learning of the mistaken verdicts, each defendant filed a motion in the United States District Court, for a further hearing upon a motion for a new trial and same was denied by the trial Court upon the premise that jurisdiction had vested in the Circuit Court of Appeals by virtue of the appeal having been perfected. (T-1 of the aforesaid Transcript) Thereupon each defendant filed a motion to remand the cause from the Circuit Court of Appeals to the United States District Court for further proceedings upon a motion for a new trial. The motion to remand was denied, as set forth

at page 53 of the aforesaid transcript of record, and same is made a part hereof, as if specifically set forth herein.

Immediately after the Circuit Court of Appeals denied the petitioners' motions to remand, they filed their petition for writ of certiorari in the Supreme Court of the United States, bearing number 252 and subsequently said petition was denied.

After the Supreme Court of the United States denied petitioners' petition for writ of certiorari, the appeal of the defendants in the Circuit Court of appeals was concluded and on May 11, 1948, the Circuit Court of Appeals affirmed the convictions of the defendants in the United States District Court. Said opinion is hereinafter set forth in the brief in support hereof.

As indicated in the opinion of the United States Circuit Court of Appeals the defendants' motion to remand was denied because the defendants did not seek to have the District Court reform the verdicts so that they would correctly express the agreement actually reached by the jury, but incorrectly expressed in the verdict, as returned into Court, thus permitting the trial Court to render judgments upon the corrected verdicts. Further, in the opinion affirming the United States District Court, the United States Circuit Court restated that neither appellant sought to have the verdict as to him corrected or reformed so that it would express conviction on the counts on which the jury intended and agreed to find him guilty and instead each defendant sought to have the verdict finding him guilty completely uprooted and nullified and a new trial awarded.

The Hon. Judge Phillips then said, in a concurring opinion:

"Appellants urge that they did not discover the alleged errors in the verdicts returned until after the jurors had been discharged and separated and had gone their respective ways, and that the trial court was then powerless to correct the errors in such verdicts, and for that reason they were entitled to a new trial. While I fully adhere to the views expressed in our former opinion in these cases, I deem it advisable to express my opinion with respect to the above contention not heretofore urged by appellants.

It is my opinion that until the trial court finally loses jurisdiction over the judgment, on a proper showing by appellants that the formal written verdicts returned, through error of the jurors in writing up their formal verdicts, did not reflect the actual verdicts agreed upon in the jury room, it may correct the written verdicts to speak the truth. The circumstances that the jurors had been discharged and separated might be a reason for the court requiring a greater quantum of proof to establish the alleged errors in the verdicts, but such circumstances would not in my opinion deprive the court of the power to correct the written verdicts so as to truly reflect the actual verdicts agreed upon by the jurors.

Surely a court that still retains jurisdiction over a case is not rendered impotent to correct an error in a verdict clearly established, by the mere circumstances that the jurors had been discharged and separated and thus permit error to prevail over truth. I cannot agree that any such defect exists in our criminal processes. Truth and justice, not error and injustice, are the ends sought to be obtained in the administration of criminal justice and a trial judge should be, and in my opinion is, endowed with power so long as it retains jurisdiction

over a case, to do what may be necessary to attain those ends.

It follows that appellants did not avail themselves of the remedy open to them.

The views I have expressed are probably implicit in the opinion of the court but it seems desirable to me to express them explicitly."

JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction to review the judgments of the United States Circuit Court of Appeals, Tenth Circuit, herein questioned, because the petitioners are being deprived of their liberty in violation of the 5th and 6th amendments to the Constitution of the United States, in that the petitioners are being deprived of their liberty without due process of law and without receiving equal protection of the laws afforded them by the Constitution of the United States and its amendments and jurisdiction vests in this court by certiorari as provided by 28 U.S.C. 347, which provides, in part:

> "347. (Judicial Code, Section 240, amended) Certiorari to circuit courts of appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed. (a) in any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for

determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

QUESTIONS PRESENTED

In a criminal case, where a jury through mistake convicts a defendant of a count in the indictment upon which it intended to acquit him and the error is not detected until 28 days after the jury has been discharged, should the error be corrected by granting a new trail or must the defendant be sentenced under the mistaken verdict if he fails to request the court to reform it to express conviction on the count on which the jury intended to find him guilty?

REASONS RELIED ON FOR THE ALLOWANCE OF WRIT

1. The United States Circuit Court of Appeals for the Tenth Circuit has decided a Federal question in conflict with applicable decisions of this Court.

2. Said Court has so far departed from the accepted and usual course of jurisdictional proceedings and has so far sanctioned such a departure by a lower Court as to call for an exercise of this Court's power of supervision.

3. Said Court's decision deprives these appellants of their liberty in violation of the rights afforded them under the Fifth and Sixth amendments to the Constitution of the United States.

WHEREFORE, your Petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Circuit Court had in the case numbered and entitled on its docket, May Term 1947, No. 3475, Lee Young, Appellant, vs. United States of America, Appellee; No. 3476, Lee Deer, Appellant, vs. United States of America, Appellee; No. 3477, Ralph Polk, Appellant, vs. United States of America, Appellee; to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said United States Circuit Court of Appeals, Tenth Circuit, dated May 11, 1948, be reversed by the Court and for such further relief as to the Court may seem proper.

Dated May ...., 1948.

AUSTIN M. COWAN
A. D. WEISKIRCH
Counsel for Petitioners.

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To the Honorable FRED M. VINSON, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION OF COURT BELOW

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit is reported in...../

JURISDICTION

1. The date of the judgment of the United States Circuit Court of Appeals for the Tenth Circuit to be reviewed is May 11, 1948.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is 28 U.S.C., Para. 347, (Jud. Code 240, amended) styled "Certiorari to circuit courts of appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed.

"(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal." "Mar. 3, 1891, C. 517, §6, 26 Stat. 828; Mar. 3, 1911, c. 231, §240, 36 Stat. 1157; Feb. 13, 1925, C. 229, §1, 43 Stat. 938.)"

3. The nature of this case and of the rulings below are such as to bring the case within the jurisdictional provisions relied on, for the following reasons:

> Petitioners are being deprived of their liberty in violation of the Fifth and Sixth amendments to the Constitution of the United States in that petitioners are being deprived of their liberty without due pro-

cess of law, without enjoying a trial by an impartial jury and without receiving equal protection of the laws afforded them by the Constitution, its amendments, and the Federal Rules of Criminal Procedure.

The Fifth amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

4. The cases believed to sustain said jurisdiction are as follows:

U. S. v. Gulf Refining Co., 268 U. S. 542, 69 L. Ed. 1082, 45 S. Ct. 597; *U. S. v. Giles,* 300 U. S. 41, 57 S. Ct. 340, 81 L. Ed. 493; *American Construction Co. v. Jacksonville, T. & K.W.R. Co.,* 148 U. S. 372, 385, 37 L. Ed. 486, 491, 13 Sup. Ct. Rep. 758; *Forsyth v. Hammond,* 166 U. S. 506, 513, 41 L. Ed. 1095, 1098, 17 Sup. Ct. Rep. 665; *Lamar v. U. S.,* 36 S. Ct. 535, 241 W.S. 103, 60 L. Ed. 912; *U. S. v. Brims,* 272 U.S. 549, 47 S. Ct. 169, 71 L. Ed. 403.

STATEMENT OF THE CASE

A statement of the case has been made in the preceding petition on page 1, which is hereby adopted and made a part of this brief.

SPECIFICATION OF ERROR

The United States Circuit Court of Appeals for the Tenth Circuit erred in its opinion affirming the judgment and sentence of the United States District Court for Kansas and the petitioners, appellants below, are being deprived of their liberty, in violation of the rights afforded them under the Fifth and Sixth Amendments to the Constitution of the United States.

ARGUMENT

The petitioners were tried upon indictment before a jury in the United States District Court for Kansas on or about January 24, 1947. A verdict of guilty was rendered against them, as heretofore set forth in this petition. Motions for a new trial, including, among other

things, the ground that the verdict was decided by a means other than by a fair expression of opinion on the part of all jurors was duly filed, argued and was by the Court denied on or about February 4, 1947. Petitioners were then sentenced, as hereinbefore indicated, and each filed his notice of appeal to the United States Circuit Court of Appeals for the Tenth Circuit on February 6, 1947.

Some 28 days after the rendition of the verdict, petitioners first learned that the verdict of the jury was decided by a means other than by a fair expression of opinion on the part of all jurors and made an appearance before the trial court March 11, 1947, moving the Court to request the United States Circuit Court of Appeals to remand the cause for a further hearing upon a motion for a new trial, on the grounds of newly discovered evidence material for a new trial. Said motion was denied by the United States District Court for the reason it claimed that jurisdiction had vested in the United States Circuit Court of Appeals by virtue of the appeal having been perfected. Following, and about March 27, 1947, petitioners filed a motion in the United States Circuit Court of Appeals to remand the cause to the United States District Court for further proceedings upon a motion for a new trial on the ground that the verdict of the jury was decided by a means other than by a fair expression of opinion on the part of all jurors, and in support of said motion, petitioners filed the affidavit of each and every juror stating in substance that the verdict rendered into open Court by the jury was a mistaken verdict.

Summarizing the affidavits, we ascertain that each juror was confused as to the various counts set forth in the indictment. The jurors thought when they were deliberating on the guilt or innocence of the petitioners that Count V was the conspiracy count. The mistake was very logically made, as the procedure for a trial in the United States District Court was quite unusual in the following aspects: The indictment was not sent into the jury room; the Court instructed in writing and sent the written instructions into the jury room; the Court in its written instructions did not instruct chronologically in the order of the counts as set forth in the indictment, and in paragraph five of the written instructions, referred to the conspiracy count which was Count I in the indictment.

From the affidavits it is apparent that the jury returned a verdict of guilty against the petitioner, Ralph L. Polk, finding him guilty of selling whiskey at wholesale, when as a matter of fact it intended to acquit him of that charge and to convict him of the conspiracy. As established by the same affidavits, the jury returned a verdict against the petitioner, Lee Young, finding him guilty of a conspiracy when in fact it intended to acquit him of conspiracy, and find him guilty of failure to pay tax as a liquor wholesaler. It follows as a matter of logic that the jury made the same mistake in arriving at its verdict on the charges preferred against Lee Deer.

When petitioners' motion to remand to the United States District Court for further proceedings upon motion for a new trial was argued in the United States Circuit Court of Appeals, the affidavit of each and every juror was *received in evidence* and it was called to said

Court's attention that the matters set forth in the affidavits were not within the knowledge of the petitioners at the time each presented his motion for a new trial and that the matters set forth therein should have been considered by the United States District Court on motion for a new trial on the grounds of newly discovered evidence, material for a new trial.

It should be particularly noted that the mistaken verdict as evidenced by the affidavits was called to the attention of the trial court and the court attaches the morning after the trial in the District Court, but neither the petitioners nor their counsel was apprized by the Court or any court attache accordingly, and first ascertained that there had been a mistaken verdict some 28 days after the discharge of the jurors in the District Court by interviewing the jurors for other purposes.

Said motion to remand for further proceedings on a new trial was denied by the United States Circuit Court of Appeals.

In the appeal decided May 11, 1948 by the United States Circuit Court of Appeals, the matter of the mistaken verdicts of the jury was called to the attention of the Court, relief thereon was sought and a new trial was requested. The appellate court, however, took the position, as indicated in its opinion, that it was the duty of the petitioners to appear before the Court and seek a reformation of the verdict. This the petitioners failed to do, upon the assumption that in a criminal case it is the function of a jury to return a verdict and to correct any mistake therein. The Court in a criminal case, can *return the jury to* correct a mistaken verdict but *if that is not done within time* the correction is made by grant-

ing a new trial rather than compelling the accused to perform an act tantamount to a plea of guilty.

When a jury returns a verdict into open Court and, through mistake convicts an accused of an offense of which they did not intend to convict him, there is in truth and in fact no verdict. The meaning of the word "verdict" is a "true saying" and is supposed to be and ought to be a deliberate conclusion in the mind of each and every juror. A verdict must be the unanimous decision made by a jury and reported to the Court and is a substantial right. (*Anthony v. Anthony,* 29 S. E. 923; *Campbell v. Granite,* 42 A. 228, 92 Me. 90; *Sitterson v. Sitterson,* 131 S. E. 642, 51 A.L.R. 760; *In re Suggs Will,* 140 S. E. 604; *Finance Corp. v. Jones,* 166 S. E. 504; *Union Pac. v. Connolly,* 109 N. W. 368; *Smith v. Paul,* 45 S. E. 348; *Williams v. Pressler,* 65 P. 934, 11 Okl. 122; *French v. Merrill,* 50 N.Y.S. 776, 27 Appl. Div. 612.)

In the instant case, as evidenced by the affidavits of every juror, what purported to be a verdict was clearly brought about by a mistake of identity of offenses. The conclusion reached was not the deliberate act of each and every juror and could not, in any sense, constitute a unanimity of opinion. Let us consider a mistaken verdict in light of the rights afforded an accused under our amendments to the Constitution, herein set forth. If the petitioners in this case go to the penitentiary under the sentence of the Court for crimes of which they were not in reality found guilty by the jury, it means that each is being deprived of his liberty without due process of law in violation of the Fifth Amendment. It means that the accused has not enjoyed the right to a public trial

by an impartial jury as is afforded an accused under the Sixth amendment to the Constitution of the United States and it further means that the accused has been denied the equal protection of the laws, as provided in the Fifth amendment to the Constitution of the United States, for the reason that a mistaken verdict and incarceration thereunder abridges his privileges as a citizen of the United States and denies him of a fair and impartial trial before a jury.

From the opinions of the United States Circuit Court of Appeals, it is apparent that the denial of petitioners' motion to remand to the United States District Court for further proceedings upon a motion for a new trial and the court's subsequent denial of the petitioners' appeal were founded upon the reason that the petitioners did not seek to have their cases remanded in order that the United States District Court could reform the verdicts so that they would correctly express the agreement actually reached by the jury but incorrectly expressed in the verdicts as rendered into open court and permit the trial court to enter new judgments upon the corrected verdicts. If the petitioners had submitted to same, it would have meant that their right to a trial by jury was abridged and it would have been tantamount to the petitioners offering a plea of guilty to a count in the indictment upon which the jury had not rendered a verdict of guilty.

As a matter of law, after a lapse of 28 days, after the discharge of a jury and the jury has been permitted to intermingle with the public, a court is without authority in law to reform or correct a verdict. That function is solely for a jury and, in support thereof, we call to

the court's attention the cases of *State v. McBride,* 19 Mo. 239; *People v. Martin,* 171 Ill. App. 153; *Allen v. State,* 85 Wis. 22, 54 N.W. 999; *U. S. v. Watkins,* Fed. Cas. No. 16,649 l.c., 28 Fed. Cas. 479; *Starkie v. Commonwealth,* 7 Leigh (Va.) 786; *Farley, et al, v. People* (Ill.) 27 N. E. 927; *State v. Dawkins,* 32 S.C. 17, 10 S. E. 772; *In re Rockwood,* 146 Kans. 386. The above decisions are unanimous in holding that a conviction of an accused must be founded upon the verdict of a jury and not upon the verdict of the Court. In an attempt to justify our opposition as to the law and without burdening the Court, we hereinafter quote excerpts from only a few of the above cited authorities.

In the *State v. McBride* case, supra, (19 Mo. 239) Justice Ryland delivered the opinion of the Court and at page 240 said:

> "The defendant, Joseph McBride, was indicted with several others for a riot, in St. Louis County. The jury found several of the persons indicted guilty, and found James McBride guilty and assessed his fine at twenty-five dollars; Joheph McBride made his motion for a new trial, which was overruled. He also moved in arrest of judgment, which was overruled. He then moved to be discharged, because the jury returned no verdict against him, which was likewise overruled, and he brings the case here by appeal. 1. The verdict of the jury is, that James McBride is guilty. James McBride was not indicted; Joseph McBride was indicted. He was the person who pleaded not guilty, and the issue was pending between the State and him. The verdict did not respond to this issue. 'Every verdict, so far as it is contrary to matter of record, is bad.' Bac. Abr. tit. Verdict (T.) The State charges a criminal act upon Joseph; he puts

in issue this charge, and the jury found that James did the act. This finding will not support a judgment against Joseph. The verdict is against what the State alleges on the record; it is bad. It cannot authorize a judgment against James, because he is not indicted; it will not support a judgment against Joseph, because it does not find him guilty, (240) 2. In the case of Little v. Larabee, 2 Greenl. 38, Mellen, C.J., said 'there are two classes of cases found in the books respecting erroneous and defective verdicts. The first class contains those cases in which the incorrectness or defectiveness of the verdict or error in the record of the judgment consists in something merely formal, and which has no connection with the merits of the cause; where the amendment, when made, in no respect impairs or changes the rights of the parties, but may only prevent the disturbance of the proceedings by writ of error, or by correcting clerical mistakes, render the record consistent and the verdict pursuant to the issue;' he then refers to numerous cases.

"The second class contains those cases where error has been committed by the jury, either by returning a verdict against the wrong party, or if not so, for a larger or smaller sum than they intended, and those where, if the amendment or alteration should be made, and the damage should be increased or diminished, or the verdict reversed, the rights of the parties would be immediately affected and changed, and this too, after the jury had, by their separation, become accessible to the parties and subject to their influence; and he cites many cases. In this last class, there can be no amendment; the remedy is, to set aside the verdict. This is the law in civil cases, in which amendments are allowed liberally; but this doctrine of amendments does not extend to criminal cases. Upon this point then, this judgment must be reversed."

Justice Thompson delivered the opinion of the Court in the case of *People v. Martin,* supra, (171 Ill. A. 153) and said, among other things:

> "The first count charges the defendants with an assault with a deadly weapon and a battery; the second and third charge an assault with a deadly weapon. On a trial the jury returned a verdict 'We, the jury, find the defendants Daniel Martin and Edwin Martin guilty in the manner and form as charged in the second count, viz.: assault and battery." * * * 'the jury found the defendants guilty of an offense not as serious as that charged in the second count but containing a material element not charged in the second count of the information. Defendant in error contends that the words 'viz., assault and battery,' are surplusage. The jury by their verdict state the offense of which they find the defendants guilty is that of assault and battery. A verdict of guilty of an assault and battery is an acquittal of a charge of assault with a deadly weapon. The verdict might have been sustained under the first count, if the jury had found the defendants guilty under that count, *but it is not the province of a court to correct a verdict by correcting an error of the jury as to the number of the count.* The verdict of guilty of an assault and battery and the judgment thereon cannot be sustained under the second count." (emphasis supplied.)

The motion in arrest was sustained and the defendants were discharged.

In the Wisconsin case of *Allen v. State,* supra, (85 Wis. 22) the Supreme Court of Wisconsin said in part:

> "An information charging that the defendant 'did willfully, feloniously, and of his malice aforethought kill and murder the deceased,' is sufficient, under section 4660, Rev. St. and under it the de-

> fendant may properly be convicted of murder in either the first, second, or third degree. But a general verdict of guilty upon such an information does not authorize the court to pronounce judgment, because the degree of the crime is not determined. * * Such being the law, it is evident that the plaintiff in error could not have been legally sentenced under the verdict as it stood when first rendered by the jury, and when they were discharged. The question, then, is, could such defective verdict be afterwards corrected, either by the court itself or by reassembling the jury, and ascertaining from them what degree of murder they intended to find? We have been referred to no authority which answers this question affirmatively with reference to a criminal, much less a capital, case; nor do we see how such doctrine could be justified. The authorities are numerous to the contrary. Com. v. Townsend, 5 Allen, 216; Cook v. State, 60 Ala. 39; Williams v. State, 44 Ill. 478. The conviction and sentence must be founded upon the verdict of the jury, not the verdict of the court." (authorities omitted.)

The cause was reversed and remanded for a new trial.

Our Supreme Court of Kansas, and within the Tenth Judicial District, has held in conformity with the above authorities in the case of *In re Rockwood,* supra, and Chief Justice Dawson said in the opinion, at page 388:

> "when a person accused of crime is put on his trial in this state he cannot be deprived of a jury trial without his consent, and the judge has no more right to discharge the jury and make a finding of guilt on his own initiative than would the bailiff or the bystanders."

These petitioners, before final judgment on the appeal in the Circuit Court of Appeals, filed their petition for

a writ of certiorari in this Court to compel the Circuit Court of Appeals to remand the cause so that the motion for a new trial could be heard in the District Court. The petition was denied in said case, being number 252, October term 1947, but we shall take the liberty to point out a portion of the argument of the solicitor general in the brief for the United States in opposition to the petition, wherein, at page 5 thereof, it is said:

> "On the contrary, courts have repeatedly held that testimony of individual jurors may be received for the purpose of correcting an error in the verdict and as such correction may be made, although the error is discovered a considerable time after the verdict was rendered. Freid v. McGrath, 135 F. 2d 833 (App. D.C.); Elliott v. Gilmore, 145 Fed. 964 (C.C.E.D. Pa.); Burlingame v. Central Railroad, 23 Fed. 706 (C.C.E.D.N.Y.); Capen v. Stoughton, 16 Gray 364 (Mass. 1860); see Pelzer Manufacturing Co. v. Hamburg-Bremen Fire Insurance Co., 71 Fed. 826 (C.C.D.S.C.) affirmed, 76 Fed. 479 (C.C.A. 4), where a suit in equity was brought for such relief for two years after the verdict was returned."

In connection with the above, it is interesting to note that not one *criminal* case was cited as authority and we now challenge the government to cite one criminal case contrary to our authorities hereinbefore supplied.

There is a marked distinction between correcting a mistaken verdict in a criminal and a civil case, as was pointed out in the opinion written by Justice Thiele in the case of *In re Brown,* 139 Kans. 614, at page 621, where the Court said:

> "It is apparent that there must be an essential difference in the return of verdicts in civil and crim-

> inal cases. In a civil case the parties are on a parity; in a criminal case the defendant is hedged about with constitutional and statutory protection which the state does not enjoy."

The Rules of Criminal Procedure in United States District Courts specify the necessity for unanimity in a verdict, and that the verdict be rendered by the jury to the Judge in open court. Rule 31 thereof states:

> "Verdict.—(a) Return. — The verdict shall be unanimous. It shall be returned by the jury to the judge in open court. * * * * * (d) Poll of jury.—When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged."

It will be noted, from sub-paragraph (d) in Rule 31, that the rule contemplates that if there is not unanimous concurrence in the verdict the jury may be directed to retire for further deliberations. Same, in substance, means that the court shall direct the jury to retire for further deliberations and correct its verdict. The only other remedy open to the court, as provided by Rule 33, of the Federal Rules of Criminal Procedure, is for the court to grant a new trial to a defendant, if same is required in the interest of justice. In the instant case, the accused requested a poll of the jury, hence he waived no right as to any irregularities in the verdict. The trial court knew of the mistaken verdict within 12 hours after its rendition. The accused were never notified by the court or the court attaches of the mistaken verdict but learned of the mistaken verdict at a date when it was

impossible, as a matter of law, to have the court reimpanel the jury and send them out to correct their mistakes; hence it follows under the law and under the Rules of Criminal Procedure that there is only one door open to correct the mistaken verdict and that is by granting a new trial.

In the special concurring opinion of presiding Judge Orie L. Phillips, he states, among other things:

> "Surely a court that still retains jurisdiction of a case is not rendered impotent to correct an error in a verdict clearly established by the mere circumstances that the jurors had been discharged and separated and thus permit error to prevail over truth. I cannot agree that any such defect exists in our criminal processes."

We too will not agree that any such defect exists in our criminal processes. The correct remedy, as hereinbefore pointed out in Rule 33 is available to the Court, namely the court should now grant a new trial so that a proper verdict may be returned into open court by a jury.

It is interesting to note that the Circuit Court of Appeals, Tenth Circuit, in October of 1929, in an opinion written by our Judge Phillips, in the case of *Jay vs. U. S.*, 35 Fed. 2d 533, at page 554, said:

> "When the jury first returned into court with its verdict, it had confused the substantive offenses charged in counts five, six and seven with the same offenses charged as overt acts numbered eight, nine and ten in the conspiracy count, so that the jury struck out of the verdict the words 'fifth,' 'sixth,' and 'seventh,' and inserted in lieu thereof the words 'eighth' 'ninth,' and 'tenth'. As the Indictment did

> not contain any eighth, ninth and tenth counts, the verdict was obviously irregular and informal and under proper instructions the jury was permitted to retire and correct its verdict so as to read 'fifth,' 'sixth' and 'seventh' counts instead of 'eighth,' 'ninth' and 'tenth' counts. The first verdict returned had not been recorded when the error was discovered and the jury instructed to again retire to correct its verdict. Counsel for the defendants contend that the Court erred in permitting the jury to retire and amend the original verdict. It is well settled that, where a verdict is informal or irregular, the Court may direct the jury, under proper instructions, to retire and bring in an amended or corrected verdict. (citations omitted) The judgment on the first count is reversed with instructions to grant the defendants a new trial, and the judgments on the fifth, sixth and seventh counts are affirmed."

The above decision recognizes it is well settled that when a verdict is irregular, the court may direct the jury, under proper instructions, to retire and bring in an amended or corrected verdict, and the opinion further recognizes a very essential ingredient, namely that when the error in the verdict was discovered the jury had not been discharged but were instructed to again retire to correct its verdict.

We reiterate that the above authority specifically indicates that no defect exists in our criminal processes concerning the matter in issue, but that the only remedy to correct the mistaken verdict is for the court to grant a new trial by reason of the fact that the jury in the instant case had not only been discharged, but had been separated 28 days after the erroneous verdict was rendered into open court and recorded.

This court has frequently granted a new trial to an accused convicted of crime where the composition of the jury was improper due to the exclusion from the panel of qualified class of jurors. If this Court grants a new trial in such a case, then there is no logical reason why the defendants in this case should not be granted a new trial where the verdict, as recorded, is not the verdict of the jury, but the defendants stand sentenced to imprisonment on charges of which they were actually acquitted by the jury, and as to which no jury has ever actually found them guilty. This Court has repeatedly indicated that a United States District Judge is not a mere referee, sitting to decide who is the better in a game of wits between opposing counsel. For this reason, this Court has repeatedly emphasized the right of the United States District Judge to comment on the evidence, to examine witnesses and take an active part in the trial of the case to the end that justice may be done and not a verdict awarded to the party having counsel with the nimblest wit. All this has been on the theory that the function of the United States trial courts is to see that justice is done between the parties regardless of any inequality in representation or condition. This is particularly true in criminal cases. It is as much the duty of the United States Attorney and of the trial Judge to see that an innocent defendant is acquitted as to convict a guilty accused. This duty applies not only to the trial court but to the appellate courts as well. It seems to us that the trial court and the appellate court have utterly failed of this duty in this case. It is admitted by all that these defendants were not actually convicted by the jury of the crimes on which they are now sentenced but were, in fact, acquitted thereon. But, due to a mis-

take of the jury, due to the way the matter was presented to it, wrong verdicts have been rendered into court. Not even in the days of the greatest technicalities of the common law, would such a result have been suffered. A new trial would have been granted by common law to correct such an error. We have here two opinions by an appellate court which admit that a wrong result has been obtained, but which deny relief because it is claimed that the defendant did not follow the proper technical procedure. In other words, instead of doing justice in the premises, the opinions of the court show a resort to the old plea of technicalities. Now what is this procedure which the appellate court says should have been followed? It was that the defendant should have moved the trial court to correct the verdict and have a verdict of guilty entered against him on other counts than the ones which the jury returned in its formal verdict. This could not be done for several reasons:

1. If the defendant had followed this procedure it would have been tantamount to a confession that a verdict should have been entered on the other counts and that would have been met, on appeal, by the plea that they had waived their right to appeal by such conduct.
2. The trial court would not have heard them any way because it took the position, by reason of the appeal, (which had occurred before the discovery of the error) it had no further jurisdiction in the matter and could not act.

There is only one way to correct an error of this kind, after 28 days had expired after the discharge of the jury before the discovery of the mistake, namely granting a new trial. Abbott Criminal Trial Practice, Fourth

Edition, Page 1386, paragraph 740, and notes therein cited.

If there is anything in the plea of reform procedure, in the simplification of the Rules of Criminal Procedure, then this error should have been corrected on the court's own motion and that speedily upon discovery of the mistake, of which mistake the trial court knew the next morning after the rendition of the verdict the night before. But after 28 days had elapsed from the time of the discharge of the jury, the defendants were entitled to have their motions for a new trial granted, as that was the only procedure left under the Federal Rules of Criminal Procedure to correct such a mistake. In substance, Mark Twain says, everybody complains about the weather but nobody does anything about it. That is the same situation we are in here. Everybody admits that these verdicts are wrong, that these defendants were not actually convicted of the crime on which they have been sentenced, but no one, so far, has done anything about it to correct the errors.

The decision of the Circuit Court of Appeals is, in effect, that the verdicts are wrong and should be corrected, but that the defendants did not pursue the correct procedure in seeking a correction. We ask the Court to put itself in defendants' position. At the time the defendants became aware of the mistake (28 days after the rendition) the only remedy known to common law or appearing in any of the authorities was the filing and granting of a motion for new trial, but the Circuit Court of Appeals affirmed the case because the defendants failed to follow a procedure unknown to the common law, never before pursued in any reported criminal case and contrary to the new Federal Rules of Criminal Pro-

cedure. Why, in the name of Justice, are the defendants to be penalized because they followed the known procedence in the matter relating to procedure in trials of criminal cases and did not forsee that there would be suggested a new method of procedure heretofore unknown.

We insist it was the duty of the trial court to right the wrong when it was discovered without any action on the part of the defendants and, in the absence of prompt action by the trial court, the defendants are entitled to a new trial, as has been granted in similar cases under like circumstances at common law.

In this matter, the defendants are without fault. They acted promptly when they discovered the mistake. The fault, if any lies at the door of the trial court, which knew of the mistake within 12 hours after it occurred and did nothing to correct it nor did the trial court apprize the defendants or their counsel of the error. The trial court heard the original motion for new trial and sentenced the defendants, knowing of the mistaken verdict and still without apprizing the accused or their counsel of such error. It would appear that the burden is on the trial court to remedy such a situation and not upon the defendants to forsee some new and unheard of procedure in such matters.

In conclusion, we respectfully submit that this case is one calling for the exercise of this court of supervisory powers by issuing a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

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